OFFICE OF THE UTAH ATTORNEY GENERAL
INFORMAL LEGAL OPINION

To: **Greg Curtis, Speaker of the Utah House of Representatives**

From: **Mark Shurtleff, Utah Attorney General**

Date: **July 17, 2007**

Subject: **Constitutionality of S.B. 30**

I. INTRODUCTION

This memorandum is in response to your request for an informal legal opinion as to the constitutionality of one of the electoral options outlined in Senate Bill 30 ("S.B. 30") passed in the 2007 General Session (http://le.utah.gov/~2007/htmdoc/sbillhtm/sb0030s01.htm) (a copy of which is attached.) S.B. 30 amended Utah Code Ann. §53A-2-118, which provides various mechanisms for the creation of a new school district by local political subdivisions.

Under scrutiny is S.B. 30's designation of the voters who are eligible and qualified to vote on the issue of the creation of a new school district when the request is initiated by a city or cities pursuant to an interlocal agreement (hereafter collectively referred to as "a city,") Utah Code Ann. §53A-2-118(2)(a)(iii).[1] Specifically, S.B. 30 provides that if a city initiates the request, those entitled to vote on the proposal are "the legal voters within the proposed new school district boundaries." Utah Code Ann. §53A-2-118(5)(b)(I). This electoral option differs from other electoral provisions of Utah Code Ann. §53A-2-118, which provide that the legal voters within both the proposed school district and the remaining school district are eligible to vote on the creation of a new school district, if the request was initiated (1) through a citizens' initiative petition, or (2) by the board of the existing school district or districts to be affected by the creation of the new district. See Utah Code Ann. §53A-2-118(2)(a)(I), (ii), (4)(e).

As you know, an attorney retained by Jordan School District has opined that allowing just the voters of the proposed new school district to vote on the proposal violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. In response to your request, a number of assistant attorneys general and I have researched and analyzed this question and we disagree. The new law clearly raises constitutional concerns, and if a City votes to split off from an existing school district, there will likely be a legal challenge. As you know, how the courts will rule depends to large extent on the standard of review they follow, and whether they will apply federal or state law. As set forth in the following legal analysis, it is the opinion of the Office of the Utah Attorney General that there is a substantial likelihood that the courts will uphold S.B. 30.

II. FEDERAL CONSTITUTIONAL LAW

Every statutory analysis begins with "the presumption of constitutionality to which every duly enacted state and federal law is entitled." Town of Lockport v. Citizens for Community Action, 430 U.S. 259, 272, 97 S.Ct. 1047, 1056, 51 L.Ed.2d 313 (1977). Nonetheless, when a law impinges on certain fundamental rights, and the right to vote may be one of the most fundamental of all, it will ordinarily be subjected to strict scrutiny by a court. Westberry v. Sanders, 376 U.S. 1, 17, 84 S.Ct. 526, 534, 11 L.Ed.2d 481 (1964). Under this exacting standard, a discriminatory law will not be upheld unless its classification: bears a close relation to the promoting of a compelling state interest; is necessary to achieve the government's goal, and is narrowly drawn to achieve that goal by the least restrictive means possible. Plyler v. Doe, 457 U.S. 202, 217, 102 S.Ct. 2382, 2395, 72 L.Ed.2d 786 (1982). If the courts apply this standard, the State of Utah will have a higher burden to meet in overcoming a constitutional challenge.

However, in what has been termed "voting qualification cases," the United States Supreme Court has varied from its application of strict scrutiny to a more relaxed standard of requiring only a rational basis for such classifications depending on the circumstances. Indeed, the Court has recognized all state election provisions touch on the right to vote, yet do not necessarily require the application of strict scrutiny. Burdick v. Takushi, 504 U.S. 428, 112 S.Ct. 2059, 2062, 119 L.Ed.2d 245, 252 (1992). Rather, the "rigorousness" of the inquiry depends on "the extent to which a challenged regulation burdens First and

Fourteenth Amendment rights." Id. at 434; 112 S.Ct at 2063. When voting rights are severely restricted, the regulation must be "narrowly drawn to advance a state interest of compelling importance." Id. (quoting Norman v. Reed, 502 U.S. 279, 289, 112 S.Ct. 698, 705, 116 L.Ed.2d 711 (1992)). “But when a state election law provision imposes only `reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, `the State's important regulatory interest are generally sufficient to justify' the restrictions.” Id.

In 1969, the Court applied strict scrutiny in the case of Kramer v. Union Free School Dist., 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969). At issue in Kramer was a New York voter qualification statute that limited the vote in school district elections to otherwise qualified residents who (1) either owned or leased taxable real property located within the district, (2) were married to persons owning or leasing qualifying property, or (3) were parents or guardians of children enrolled in a local district school for a specified time during the preceding year. Id. Without deciding whether or not a State may in some circumstances limit the franchise to residents "primarily interested in" or "primarily affected by" the activities of a given governmental unit, the Court assumed for purposes of its analysis that the voting constituency in school district elections could be limited to those "primarily interested in school affairs." Id. at 682, 89 S.Ct. at 1892. Nonetheless, the Court concluded that the State's classification of voters on the asserted basis of that interest was so imprecise that the exclusion of otherwise qualified voters was constitutionally impermissible. The Court noted that when a citizen can demonstrate that he lives in the relevant political jurisdiction, there is a strong presumption that he is entitled to vote in elections, and it will require "an exacting standard of precision . . . of statutes which selectively distribute the franchise." Id.

Subsequent to Kramer, the Court began recognizing the need for states to utilize voting-based classifications in some instances and, accordingly, began moving away from analyzing all such statutes under strict scrutiny. In Town of Lockport v. Citizens for Community Action, the Court upheld a New York statute requiring the approval of concurrent majorities of voters living within city limits and those living outside the city limits before a new county charter could be adopted. 430 U.S. 259, 272, 97 S.Ct. 1047, 1056, 51 L.Ed.2d 313 (1977). The Lockport Court recognized the high degree of deference due a voting-based classification when a state has undertaken the essentially political task of apportioning power among its local governmental subdivisions - "constituent units that in a sense compete to provide similar governmental services." Id. at 272, 97 S.Ct. at 1055.

The Court went on to reiterate that recognition of the distinctive interests of various resident groups is based on the realities associated with distributing governmental power and conforms with its former cases "that recognize both the wide discretion the States have in forming and allocating governmental tasks to local subdivisions, and the discrete interests that such local governmental units may have qua units." Lockport, 430 U.S. at 269, 97 S.Ct. at 1054 (citing Reynolds v. Sims, 377 U.S. 533, 580, 84 S.Ct. 1362, 1391, 12 L.Ed.2d 506 (1964); Mahan v. Howell, 410 U.S. 315, 93 S.Ct. 979, 35 L.Ed.2d 320 (1973); Abate v. Mundt, 403 U.S. 182, 91 S.Ct. 1904, 29 L.Ed.2d 399 (1971).

In analogizing the contested referendum to an annexation proceeding, the Court stated "the fact that the residents of the annexing city and the residents of the area to be annexed formed sufficiently different constituencies with sufficiently different interests could be readily perceived. The fact of impending union alone would not so merge them into one community of interest as constitutionally to require that their votes be aggregated in any referendum to approve annexation." Lockport, 430 at 271, 97 S.Ct. at 1055.

Of note is the Court's statement that the equal protection analysis applied in determining the fairness of an election of legislative representatives is of "limited relevance, however, in analyzing the propriety of recognizing distinctive voter interests in a `single shot' referendum. In a referendum, the expression of voter will is direct, and there is no need to assure that the voters' views will be adequately represented through their representatives in the legislature." The Court continued to explain that given the nature of a referendum, i.e., putting one discrete issue to the voters, if the referendum has a disproportionate impact on an identifiable group of voters, the question becomes whether a State can recognize that impact by limiting the franchise to those specially affected. Id. at 266, 97 S.Ct. at 1052.

This deferential trend was continued in Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 99 S. Ct. 383, 58 L.Ed.2d 292 (1978). In Holt, an unincorporated civic association and individual residents of an unincorporated community on the outskirts of Alabama brought an action contesting the fact that they were subjected to the adjacent city's police and sanitary regulations, criminal jurisdiction, and licensing power, but were without the power to participate in city's political processes. The Court held that residents of the unincorporated community did not have a constitutional right to participate in the city's elections merely because they were subjected to its jurisdiction. Indeed the Court found that the statutes at issue were a rational legislative response to problems faced by the State's burgeoning cities, and violated neither the equal protection clause nor the due process clause of the Fourteenth Amendment. Id. at 68, 99 S.Ct. at 389.

In Holt, the Court held that because the voting qualifications coincided with the geographical boundary of the governmental unit at issue (i.e. all legal voters within the city's geographical boundaries were eligible to vote in the city's election while those outside the city were not), the Court would only examine whether the Alabama statutes bore some "rational relationship to a legitimate state purpose. The Fourteenth Amendment does not prohibit legislation merely because it is special, or limited in its application to a particular geographical or political subdivision of the state. Rather, the Equal Protection Clause is offended only if the statute's classification `rests on grounds wholly irrelevant to the achievement of the State's objectives." Id. at 70-71, 99 S.Ct. at 390 (internal citations omitted).

In so holding, the Court emphatically stated: "No decision of this Court has extended the `one man, one vote," principle to individuals residing beyond the geographic confines of the governmental entity concerned, be it the State or its political subdivisions. On the contrary, our cases have uniformly recognized that a governmental unit may legitimately restrict the right to participate in its political processes to those who reside within its borders." Holt, 439 U.S. at 68-69, 99 S.Ct. at 389 (citing Dunn v. Blumstein, 405 U.S. 330, 343-344, 92 S.Ct. 995, 1003-04, 31 L.Ed.2d 274 (1972); Evans, 398 U.S. at 422, 90 S.Ct. at 1754; Kramer, 395 U.S. at 625, 89 S.Ct. at 1888; Carrington v. Rash, 380 U.S. 89, 91, 85 S.Ct. 775, 777, 13 L.Ed.2d 675 (1965); Pope v. Williams, 193 U.S. 621, 24 S.Ct. 573, 48 L.Ed. 817 (1904). "A city's decisions inescapably affect individuals living immediately outside its borders" yet "no one would suggest that nonresidents likely to be affected by" municipal action "have a constitutional right to participate in the political processes bringing it about." Id. at 69, 99 S.Ct. at 389. “Neither `interest’ nor `impact’ carries with it the right to the franchise in municipal elections for people living outside the city limits.” Richard Briffault, Voting Rights, Home Rule, And Metropolitan Governance: The Secession of Staten Island As A Case Study In The Dilemmas Of Local Self-Determination, 92 Colum. L. Rev. 775, 796-7 (1992).

The United States Supreme Court has made it clear through its voting qualifications cases that constitutionally infirm statutes share one common characteristic: They deny the franchise to individuals who are physically resident within the geographic boundaries of the governmental entity concerned. See, e.g., Kramer; Cipriano v. City of Houma, 395 U.S. 701, 89 S. Ct. 1897, 23 L.Ed.2d 647 (1969) (invalidating a Louisiana law which provided that only "property owners" could vote in elections called to approve the issuance of revenue bonds by a municipal utility system because the challenged classification impermissibly excluded otherwise qualified residents who were substantially affected by and directly interested in the matter put to a referendum); Phoenix v. Kolodziejski, 399 U.S. 204, 90 S.Ct. 1990, 26 L.Ed.2d 523 (1970) (utilizing Cipriano rationale to invalidate an Arizona law restricting the franchise to property taxpayers in elections to approve the issuance of general obligation municipal bonds); Evans v. Cornman, 398 U.S. 419, 90 S.Ct. 1752, 26 L.Ed.2d 370 (1970) (overturning a ruling that held that persons living on the grounds of the National Institutes of Health (NIH), a federal enclave located within the geographical boundaries of Maryland, did not meet the residency requirement of the Maryland Constitution and thus, were denied the right to vote in Maryland elections); Hill v. Stone 421 U.S. 289, 95 S. Ct. 1637, 44 L.Ed.2d 172 (1975) (invalidating provision of the Texas Constitution restricting franchise on general obligation bond issue to residents who had "rendered" or listed real, mixed, or personal property for taxation in the election district); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 86 S.Ct. 1079, 16 L.ED.2d 1969 (1966) (invalidating Virginia statue conditioning the right to vote of otherwise qualified residents on payment of a poll tax).

Accordingly, the heart of the matter in our present inquiry is what is the appropriate geographical boundary of the governmental entity concerned. An argument can be made that in a secession setting like S.B. 30 supposes, where the fundamental alteration is the detachment of a part from the whole, the entire existing school district is the status quo and, as such, constitutes the appropriate geographical boundary. Richard Briffault, 92 Colum. L. Rev. at 799. If, as the Lockport Court put it, "the fact of impending union alone would not so merge [an annexing city and the area to be annexed] into one community of interest as constitutionally to require that their votes be aggregated in any referendum to approve annexation," then the fact of impending secession might not divide the school district into two communities of interest as to justify constitutionally the limitation of the franchise in the secession referendum to the seceding area. Lockport, 430 at 271, 97 S.Ct. at 1055; Briffault, 92 Colum. L. Rev. at 799.

However, a different reading of Lockport and Holt is that the Supreme Court considers the entire issue of local boundary-drawing, with its resultant impact on the scope of the right to vote, to be a matter for the political judgment of state legislatures without federal constitutional limitation or guidance. Briffault, 92 Colum. L. Rev. at 800. The failure of the Court to directly address the boundary question highlights just how much the Court is willing to leave the determination of local boundaries to the discretion of the states. Id. Such discretion is subject to strict review when the state allows some, but not all, of the local citizens within the designated geographical boundary to participate in a decision concerning the organization of local government. However, Lockport and Holt clearly reaffirmed the states' discretion to choose the territorial boundary lines within which any voter classification will be subject to strict scrutiny. Thus, the

determination of the proper unit for local self-government may be a matter for state legislatures/political resolution rather than one for federal constitutional review. Id.

Accordingly, legal standards for scrutinizing the procedure for the secession of one locality from another may be seen as primarily a matter of state, not federal, constitutional law, and involve an analysis of the meaning and scope of state constitutional protection of local home rule.

III. UTAH LAW

Under Utah law, similar to federal law, an act of the Legislature is "presumed to be constitutional." Utah Safe to Lean - Safe to Worship Coalition, Inc. v. State, 2004 UT 32, 94 P.2d 217. Gallivan v. Walker, is the arguably the most significant case analyzing Utah's position on the fundamental right to vote. 2002 UT 89, 54 P.3d 1069. In Gallivan, the Utah Supreme Court stressed that even though Utah's uniform operation of laws provision and the federal equal protection clause embody similar fundamental principles, Utah's uniform operation of laws provision is "at least as exacting and, in some circumstances, more rigorous than the standard applied under the federal constitution." Id. at &33, 54 P.3d at 1084 (quoting Mountain Fuel Supply Co. v. Salt Lake City Corp., 752 P.2d 884, 889 (Utah 1988)).

In examining the validity of the multi-county signature requirement for placing an initiative on a statewide ballot, the court noted that insofar as the issue impacted the right of the people to exercise their reserved legislative power and their right to vote, both of which are deemed fundamental and critical rights under the Utah Constitution, it would review the challenged law with heightened scrutiny. Gallivan, at && 41, 42, 54 P.3d at 1086. Under such an analysis, a statutory classification which discriminates against a person's constitutionally protected fundamental or critical right will only be constitutional if it is reasonably necessary to further, and in fact actually and substantively furthers, a legitimate legislative purpose. Id. at & 42 (citing Lee v. Gaufin, 867 P.2d 572, 582-83 (Utah 1993). In Gallivan the court determined that the multi-county signature requirement effectively discriminated against urban voters because it gave voters in rural counties a disproportionate amount of voting power. Id. at & 64, 54 P.3d at 1092. Moreover, the court found that the multi-county signature requirement was not reasonably necessary to further, and did not in fact actually and substantively further, any of the six articulated legislative purposes. Id. Accordingly, the court found the statute unconstitutional under the uniform operation of laws provision of the Utah Constitution. Id.

Subsequent to Gallivan, the Utah Supreme Court has recognized that " [c]ommon sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections," and "applying strict scrutiny to each and every [election] regulation . . . is neither required nor appropriate." Safe to Learn, & 34, 94 P.3d at 228 (citing Burdick, 504 U.S. 428, 433, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992). Accordingly, in Safe to Learn, the court utilized an lower level of scrutiny to upheld the constitutionality of Utah's amended initiative statute. Id. at & 35. The court stated that it would uphold the enactment if it was reasonable, had a legitimate legislative purpose, and it reasonably tends to further that legislative purpose. Id.

However, regardless of the level of scrutiny applied, the Gallivan court stressed that two threshold issues must first be addressed: (1) what, if any, classification is created, and (2) whether that classification is discriminatory, i.e., whether it treats the members of the class disparately. Id. at & 43, 54 P.3d at 1086. These threshold issues are at the center of the present inquiry. Clearly an argument can be made that no classification is created. Unlike in Gallivan, which involved a statewide initiative, the instant legislation focuses solely on the geographical area of a school district. If the pertinent geographical boundary is the proposed school district, then clearly no classification amongst voters within that boundary has been created, i.e. every voter within that boundary is entitled to vote on the proposal. If, however, the relevant geographical boundary is the entire existing school district, then a discriminatory classification exists, i.e., it treats the residents of the remaining territorial portion of the school district differently from the residents within the proposed new school district territory.

Assuming arguendo, that a discriminatory classification exists, the next question is what is the State's legitimate interest in creating this classification. The State's interest is likely to be found in recognition of the benefits of local home rule. In Utah, State v. Hutchinson is the leading case interpreting the doctrine of home rule. 624 P.2d 1116 (Utah 1980). The court noted that the legislature has conferred upon cities the authority to pass all rules "necessary for carrying into effect or discharging all powers and duties . . . [that] are necessary and proper to provide for the safety and preserve the health, and promote the prosperity, improve the morals, peace and good order, comfort and convenience of the city and the inhabitants thereof, and for the protection of property therein . . ." Id. at 1118 (citing Utah Code Ann. §10-8-84). Indeed, >the history of our political institutions is founded . . . on the concept . . .that the more local the unit of government is that can deal with a political problem, the more effective and efficient the exercise of

power is likely to be." Id. at 1121. "The fact is that every provision of the Constitution relating to this important subject appears to manifest an intention to bring those through whom power is to be exercised as close as possible to the subjects upon whom the power is to operate to preserve the right of local self-government to the people . . ." Id. at 1123. This philosophy is evidenced in Utah's statutes pertaining to the incorporation of a contiguous area of a county as a city. See Utah Code Ann. §10-2-103 et. seq. Indeed, the voters eligible to vote at such an incorporation election are those qualified voters who are residents of the proposed city. Utah Code Ann. §10-2-111, -112. Thus, the electoral scheme in S.B. 30, which mirrors the city incorporation statutes, is based on the same premise: bring the power to vote to those individuals who are within the governmental unit seeking to exercise their rights of local self-government.

Although S.B. 30 is silent on the issue of legislative intent, a legitimate, rational basis can be articulated for limiting the eligible voters to residents within the boundaries of proposed new school district when a city initiates the process. The city's territorial limits, which will form the new school district, provide a precise geographic boundary for determining those voters who, as residents and taxpayers of the proposed new school district, have a more direct interest in the outcome of the proposal. Providing residents of the city the right to control the vote on such a proposal allows those primarily interested and affected to determine their own fate through the polls, a fundamental principle of our system of government. They will be, after all, primarily responsible for creating, funding and operating their new school district. The city is the governmental unit which may be ultimately charged with providing a substantial amount of its sales and property taxes to the new school district. Moreover, the city's proposal is directly linked to its responsibility to provide for the educational interests of its residents through local self-government. Accordingly, the Legislature's decision to make the city residents solely eligible to vote for or against the proposed school district, in instances where the request was initiated by the city, is defensible as a reasonable determination of the appropriate electoral boundaries.
This rationale conforms with the legislative decision to allow the residents of the entire school district to vote on a proposed school district when the request is initiated through either a citizens' initiative or by a district school board. When a district school board initiates such a request, the residents of that governmental entity comprise the entire school district. The school district is charged with providing for the educational needs of everyone within the entire school district. Thus, it is sound policy to allow all those residents a right to vote on the board's proposal to change the scope of the district's operation. Similarly, in the case of a citizens' initiative petition, the citizen's themselves do not comprise a legally recognized governmental unit which has a corresponding territorial geographic boundary. As residents of the entire school district, who are attempting to affect the educational services of the entire district, it is entirely reasonable to allow all qualified voters within the entire school district to vote on the proposal.

In sum, examining the geographic boundaries of the entities instituting the proposal does not manifest an overall electoral scheme that is wholly irrational. Quite to the contrary, the statutory framework recognizes the public policy benefits to the State in furthering the reorganization of school districts in order to improve the education system. The framework created by S.B. 30 allows various groups to initiate such reorganization and provides a rationally defined electorate to vote on the proposal.

IV. OTHER STATES' LAWS

In general, most states provide that a proposal to create a new school district must be submitted to and voted on by all the electors of the district from which a part of its territory is to be taken for the formation of a new district. See e.g., AZ ST § 15-460 (B) (providing "[a] majority of the qualified electors voting on the question in the territory to remain in the existing school district and a majority of the qualified electors voting on the question in the territory to be excluded must approve the change"); VT.C.A Title 2, Subtitle C §13.104(d) (providing that "[t]he new school district is created only if the proposition receives: (1) a majority of the votes in the territory to be detached; and (2) a majority of the votes in the remaining territory in each district from which property is to be detached . . ."); C.R.S.A. § 22-30-120 (requiring a majority of the votes cast in each affected school district to approve the plan before a new school district can be created); McKinney's Education Law §1504(3) (allowing a municipality to organize a new school district consisting of the entire territory of such municipality whenever required by the educational interests of the community. However, no such new school district shall be created unless first approved by: (1) a majority vote of the residents of a municipality seeking to organize a new school district; (2) a majority votes of the trustees or members of the boards of education of the existing school district from which the new school district will be organized; and (3) a majority vote of the remaining residents of the existing school district); State v. Welch, 190 N.W. 77, 78 (S.D. 1922) (holding that in a detachment case, where territory from an existing school district wished to detach and form its own school district, that the term "each affected district" means all qualified voters in existing school district are entitled to vote. The holding was predicated on the reasoning that the proposed school district was not then a district, it was only a portion of an existing district and was only a proposed district); Cf. Cummings v. Drake, 138 S.E. 156, 158 (GA. 1927) (in election on consolidation/annexation of territory into an existing school district, the entire district from which it is proposed to take a part of its territory is entitled to vote in the election); State v. Stone, 53

S.W. 1069 (Mo. 1899) (requiring concurrent majorities in separate elections held in all districts to be affected by creation of new school district); McGehee v. Boedeker, 200 S.W.2d 697, 698 (1947) (consolidation of school district can only be effected when the proposed consolidation has carried by a majority vote in each district at an election held separately in each of the interested school districts.)

Nonetheless, there are some instances in which a state legislature has restricted the right to vote on the establishment of a new district, which will be created by detaching territory from an existing school district, to the residents of the proposed district. See, Ohio Revised Code Title 33 Section 3311.26 (providing that "[t]he persons qualified to vote upon a proposal are the electors residing in the proposed new district."); AR ST § 6-130-1504(c)(1)(C) (providing that when creating a new school district by detachment, i.e. detaching a portion of a pre-existing school district, "[a]ll of the qualified electors residing within the territory to be detached shall be entitled to vote in the election").

Indeed, the Ohio Attorney General issued Opinion No. 2003-018, stating that it was his opinion that under Ohio law if a referendum election is held to create a "new local school district from one or more local school districts . . ., the electors residing in the district that would be newly created are eligible to vote upon the proposal, but those residing in the original district or districts that would lose territory are not." However, his opinion focused solely on the language of the statute and was not an opinion on the constitutionality of such a practice.

An older Illinois case upheld a similar electoral scheme. In McLain v. Gardner, resident voters in the remaining territory of the existing district, i.e. territory that was not taken into the new school district, did not enjoy the right to vote upon the proposition of its establishment. 96 N.E.2d 551, 555 (Ill. 1951). The law entitled only those persons residing in the territory described in the initiating petition to vote upon the proposition of creating a new school district. In upholding the voting classification, the court reasoned that "the provision reflects the legislative intent to restrict the right to vote to those persons who are to be residents and taxpayers of the new school district because they have a more direct interest in its formation than those persons who reside in the remaining portion of a so-called fractioned district." Id.

However, not all cases have upheld this practice. In Fullerton Joint Union High Sch. Dist. v. State Bd. of Educ., 654 P.2d 168, 186-87 (Cal. 1982), the Supreme Court of California, applying a strict scrutiny analysis, held that limiting the right to vote to only those residents of a proposed school district denied equal protection to other remaining residents of the existing school district. While clearly on point, perhaps "because of the United States Supreme Court's guidance, no other jurisdiction has ever cited the relevant discussion of Fullerton with approval. Rather other courts have also held, implicitly or explicitly, that the rational basis test applies to state legislation to exclude extraterritorial residents from voting on a change of municipal organization." Board of Supervisors of Sacramento Co. v. Local Agency Formation Comm'n of Sacramento Co., 838 P.2d 1198, 1210 (Cal. 1992).
Consequently, ten years after Fullerton, the California Supreme Court in Board of Supervisors, analyzed the constitutionality of a California law which provided that only voters residing in the territory to be incorporated may vote in the election to confirm the incorporation. In upholding the constitutionality of the statute, the court specifically rejected the strict scrutiny analysis of the Fullerton decision in favor of a rational basis standard of review. The court noted that Fullerton, as a plurality opinion, lacked authority as precedent. 838 P.2d at 1207. Moreover, the court pointed out that the Fullerton court's analysis has never been cited with approval. Id. at1210. In softening its criticism, the court implied that the Fullerton decision to apply strict scrutiny was based in large part on a concern that failure to do so could result in racial segregation.

The court acknowledged the tension between the fiscal concerns of the annexing territory's residents and the desire for self-government. However, the court refused to utilize strict scrutiny: "[T]hough the right to vote is perforce implicated whenever the state specifies that certain people may vote and others may not, we conclude that the essence of this case in not the fundamental right to vote, but the state's plenary power to set the conditions under which its political subdivisions are created." Id. at 1205. After distancing itself from the need to apply strict scrutiny, the Board of Supervisors court upheld the contested law, applying the rational basis test to the classification, stating that the "act's accommodation of competing local interest may be imperfect, but that is not enough, by itself, to offend constitutional principles. As counsel remarked at oral argument, "It's not a question of what would be the perfect arrangement as a matter of political science; it's what the Constitution requires." Id. at 1211.

V. CONCLUSION

In conclusion, it is the opinion of the Office of the Utah Attorney General that when a city initiates a request to create a new school district pursuant to Utah Code Ann. §53A-2-118(5)(b)(I), the legislative decision to limit the eligible voters to those residents living within the geographic boundaries of the city should be

reviewed by the courts using a rational basis standard. Legitimate state interests can be put forth which support this enactment which, when considered in light of the presumption of constitutionality afforded all duly enacted state laws, should result in the courts affirming the Legislature's discretion to draw the territorial boundary lines in the manner provided for in S.B. 30.

Endnotes:

[1]Utah Code Ann. §53A-2-118 provides:
(1) A county legislative body may create a new school district from an existing school district, as provided in this section, if the area of the new school district is within or, under Subsection 53A-2-118.1(2)(b)(ii), considered to be within the geographical boundaries of the county.
(2) The process may be initiated:
. . .
(iii) at the request of a city within the boundaries of the school district or at the request of interlocal agreement participants, pursuant to Section 53A-2-118.1.